United Nations A/HRC/28/NGO/158

General Assembly

Distr.: General
27 February 2015

English only

Human Rights Council
Twenty-eighth session
Agenda item 3
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Written statement* submitted by Amnesty International, a non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[16 February 2015]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

GE.15-03778 (E)

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Spain must take prompt steps to address concerns of the Working Group on Enforced or Involuntary Disappearances and the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence

Amnesty International welcomes the reports of the Working Group on Enforced or Involuntary Disappearances (the Working Group) on its visit to Spain in September 2013 (A/HRC/27/49/Add.1, of 2 July 2014) and of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on his visit to Spain in January/February 2014 (A/HRC/27/56/Add.1, of 22 July 2014).

The Working Group observed, among other concerns, that the **Spanish Criminal Code** does not contain a separate offence of enforced disappearance.[1] Amnesty International has expressed the same concern with regard to the fact that the Criminal Code does not codify the crime of enforced disappearance in accordance with the requirements of the International Convention for the Protection of All Persons from Enforced Disappearance (Convention on Enforced Disappearances). The ordinary crime of illegal detention or kidnapping with whereabouts unknown, as contained in Article 166 of the Criminal Code, does not meet the requirements of the definition under the Convention.

In this regard, Amnesty International welcomes that in the draft National Report elaborated for the Universal Periodic Review, which was shared with civil society organizations in July 2014, the Spanish government states: "(…) following the recommendations made by the Working Group of Enforced Disappearances, the Committee on Enforced Disappearances and the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, it is being analyzed the introduction of the enforced disappearance as a separate offence, in the reform of the Spanish Criminal Code".[2] We recommend that Spain come to its UPR examination prepared to announce the legislative changes necessary to bring the Criminal Code into line with the Convention on Enforced Disappearances.

Amnesty International also welcomes the Working Group's recommendation that Spain "act with due urgency and speed in the matter of enforced disappearances, as required by the Declaration and other international obligations. Urgency and speed are of the essence given the advanced age of many of the family members and witnesses who were the last to see persons disappeared during the Civil War and the dictatorship alive."[3] Our organization has documented and denounced that the rights to truth, justice and reparation for the victims of the Civil War and Francoism (1936-1975) are denied in Spain. It has been regularly monitoring the actions taken by Spanish courts since the National High Court declined jurisdiction in favor of regional courts in November 2008. As a result Amnesty International has found that, of the 47 cases which were filed with Spanish courts after that date, at least 38 cases have been closed (though this number may be even higher.)[4]

On 27 February 2012, the Supreme Court handed down a ruling that is inconsistent with international law on enforced disappearances. The Supreme Court ruled that crimes committed during the Civil War and Franco period should not be investigated by the Spanish courts, using arguments that Amnesty International has concluded to be in breach of international law (arguments include: statutory limitations; those allegedly responsible are presumed dead; the Amnesty Law; the Law of Historical Memory – the Supreme Court stated that "the right to know the truth does not form part of

1 A/HRC/27/49/Add.1, paragraph 13.

2 Draft National Report for the Universal Periodic Review, paragraph 10.

3 A/HRC/27/49/Add.1, paragraph 67 (a).

4 For further information see Amnesty International, Time passes, impunity remains: Universal jurisdiction universal, a tool with which victims of the Civil War and Franco eras can combat impunity, June 2013, available in Spanish at https://doc.es.amnesty.org/cgi-bin/ai/BRSCGI/EUR4140013-25119%20El%20tiempo%20pasa%20la%20impunidad%20permanece%20Informe?CMD=VEROBJ&MLKOB=32463093939 and executive summary available in English at http://www.amnesty.ca/sites/default/files/spainaispainreportsummary17june13.pdf.

the criminal process" and is the task of other bodies, especially historians). The Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, in the report on his visit to Spain stated his concerns "at the content of the Supreme Court's ruling of 27 February 2012 acquitting the incumbent of Criminal Investigation Court No. 5 for having initiated investigations into forced disappearances which had occurred during the Civil War and the dictatorship, and its decision to transfer the jurisdiction to regional courts. Despite the acquittal in this particular case, this ruling would have confirmed the tendency of judges to shelve any similar cases that come before them." [5]

The cases closed by judges subsequent to that ruling all relied specifically on it. The Supreme Court ruling therefore seems to have blocked off the last avenue for investigating these crimes in Spain, and cases continued to be closed automatically throughout the country. Amnesty International fully endorses the Working Group's recommendation that Spain must "ensure that the judiciary, and particularly the highest courts, such as the Constitutional Court and Supreme Court, make consistent use of the Declaration and other international instruments."[6]

In addition, our organization has observed that the Spanish authorities refuse to cooperate as they ought to, according to international law and the bilateral treaty,[7] with the Argentinean courts, which, since April 2010, have exercised universal jurisdiction for actions filed for crimes under international law – including enforced disappearances- committed during Francoism.[8] In this regard, the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence recalled Spain's "international obligation to either extradite or judge and that the extradition of the accused can only be denied if the Spanish courts themselves initiate investigations and judge those responsible."[9]

Amnesty International shares the Working Group's assessment that the recent amendments made through a "new legislative framework [the Basic Law 1/2014], adopted after [the Working Group's] visit" restrict the scope of universal jurisdiction even more.[10] This reform limits even more the narrow possibility of investigation in Spain, under the principle of universal jurisdiction, of crimes under international law, such as enforced disappearance.[11]

The reform, by limiting Spanish courts' ability to investigate and prosecute serious crimes under international law, contravenes Spain's international obligations, including under the Convention on Enforced Disappearances and is a clear step back in the struggle against impunity by adding a further obstacle to Spanish judges' ability to investigate serious human rights violations that may have occurred outside Spain.[12]

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5 A/HRC/27/56/Add.1, of 22 July 2014 paragraph 77.

6 A/HRC/27/49/Add.1, paragraph 67(g).

7 Extradition and Mutual Legal Assistance Treaty between Argentina and Spain.

8 For further information see Amnesty International, Closed Cases, Open Wounds, available in Spanish at https://doc.es.amnesty.org/cgi-bin/ai/BRSCGI/44110212%20Resumen%20Informe%20heridas%20abiertas?CMD=VEROBJ&MLKOB=31219680404.

9 A/HRC/27/56/Add.1, of 22 July 2014 paragraph 84.

10 A/HRC/27/49/Add.1, paragraphs 48 and 49. Said reform changes article 23.4 of the Basic Law 6/1985 of the Judiciary.

11 The requirements to open an investigation required by the reform include that the alleged perpetrator is Spanish or alien and lives in Spain; or that the victim was Spanish and the alleged perpetrator is in Spain.

12 Likewise, the reform has an impact not only on future investigations that may be opened, but is also intended to be applied to cases already opened. For further information, see "Los legisladores españoles deben rechazar la reforma propuesta que pretende cerrar la puerta a la justicia para los crímenes más graves", Amnesty International's press release , available only in Spanish at https://www.es.amnesty.org/noticias/noticias/articulo/los-legisladores-espanoles-deben-rechazar-la-reforma-propuesta-que-pretende-cerrar-la-puerta-a-la-j/.

The Working Group also expressed concerns regarding the regime of **incommunicado detention** and recommended that Spain repeal the legislation that establishes that regime.[13] In this context, Amnesty International highlights that Spain maintains incommunicado detention in its legislation for suspects of terrorism-related offences.[14] Incommunicado detention not only violates important rights of the detainees held incommunicado that are essential to ensure a fair trial – including prompt, effective access to legal representation, but facilitates torture and other ill-treatment of detainees.[15]

Amnesty International notes the additional concern expressed by the Working Group to the effect that in some cases **migrants** had been expelled from Spain without following the relevant legal procedures, which prevented a case-by-case consideration of whether the expellees might be at risk of human rights violations, including enforced disappearance.[16]

Amnesty International shares this concern. Spain has continued to prevent people fleeing from human rights violations in third countries from having access to the asylum procedures, particularly on the border with Morocco. There have been collective and individual expulsions to Morocco without observing relevant Spanish legal procedures, where persons concerned could be at risk of suffering human rights violations, including enforced disappearances.

Amnesty International urges Spain to implement the recommendations contained in the reports of the Working Group and of the Special Rapporteur and to report back to the Human Rights Council on the measures taken to do so.

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13 A/HRC/27/49/Add.1, paragraphs 53 and 67 (jj).

14 For further information, see "Spain: Out of the shadows: Time to end incommunicado detention", AI Index" EUR 41/001/2009, September 2009, available at http://www.amnesty.org/en/library/info/EUR41/001/2009/en

15 See, for example, Preliminary Observations of the Human Rights Committee: Peru, UN doc.: CCPR/C/79/Add.67, para 17, 25 July 1996. The UN Special Rapporteur on torture and other cruel, inhuman or degrading stated, in his report on his visit to Spain in 2003, that "although torture or ill-treatment is not systematic in Spain, the system of detention as it is practised allows torture or ill-treatment to occur, in particular in regard to persons detained incommunicado in connection with terrorist-related activities." (E/CN.4/2004/56/Add.2, 6 February 2004, paragraph 41).

16 A/HRC/27/49/Add.1, paragraph 54.